WISCONSIN LEGISLATIVE COUNCIL

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Developments in Constitutional Law: Abortion

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Current U.S. Supreme Court case law interprets the U.S. Constitution to guarantee a right to abortion until a fetus is "viable" – i.e., able to survive outside a uterus. However, the Court may be poised to overrule that case law. This issue brief summarizes key legal precedents, a pending case (*Dobbs v. Jackson Women's Health Organization*), and potential effects on Wisconsin law.

KEY LEGAL PRECEDENTS

The U.S. Supreme Court first recognized a constitutional right to pre-viability abortions in its 1973 *Roe v. Wade* decision. *Roe* involved a constitutional challenge to a state law that criminalized abortion except when necessary to save a mother's life. The Court held that a right of privacy, grounded primarily in the Fourteenth Amendment's due process clause, guarantees the right to an abortion before viability. But it held that the right to privacy is not "absolute"; after viability, states have far greater latitude to regulate abortion. [410 U.S. 173 (1973).]

The Court reaffirmed *Roe*'s central holding two decades later, in *Planned Parenthood v. Casey*. In *Casey*, the Court also articulated a new "undue burden" standard for evaluating the constitutionality of abortion regulations. Under that standard, a law must not impose a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." [505 U.S. 833 (1992).]

In more recent decisions, the Court has continued to recognize a right to pre-viability abortions, but with an increasing number of justices expressing skepticism regarding the constitutional grounding for that right and some disagreement regarding how the "undue burden" standard should be applied. In a 2016 decision, *Whole Women's Health v. Hellerstedt,* 579 U.S. 582 (2016), the Court applied *Roe* and *Casey* to strike down a state law that required abortion providers to have admitting privileges at nearby hospitals. The Court interpreted *Casey*'s undue burden test to require courts to balance the "burdens a law imposes on abortion" and "the benefits those laws confer." When the Court considered a very similar law four years later, in *June Medical Services v. Russo*, 591 U.S. ___ (2020), only four justices joined a plurality opinion applying the *Hellerstedt* balancing analysis. Chief Justice Roberts, who provided the crucial fifth vote to overturn, did so based on the doctrine of *stare decisis*, discussed below. He characterized the *Hellerstedt* balancing approach as a misreading of *Casey*, saying: "Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts."

Since the *June Medical Services* decision, lower courts have disagreed regarding which test to use to evaluate laws regulating abortion. For example, the U.S. Court of Appeals for the Seventh Circuit recently followed *June Medical Services*' plurality opinion by applying the *Hellerstedt* balancing test. In contrast, the U.S. Court of Appeals for the Eighth Circuit determined that the reasoning in Chief Justice Roberts's concurrence set the precedent.[1]

STARE DECISIS

Stare decisis is a doctrine that generally directs the Court to follow its prior precedent. However, "[*s*]*tare decisis* is not an 'inexorable command'." [*Payne v. Tennessee*, 501 U.S. 808, 828 (1991).] In *Casey*, the Court articulated a multi-factor test for applying the doctrine: (1) whether a precedent has proven to be practically unworkable; (2) whether the precedent is subject to a kind of reliance that would create special hardships and inequity; (3) whether related principles of law have so far developed as to have left the precedent no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the precedent of significant application or justification. In *Casey*, the Court applied those factors to reaffirm *Roe*. [*Casey*, 505 U.S. at 854-59.]

A 2018 decision authored by Justice Alito refined the *Casey* analysis by identifying five *stare decisis* factors as most important: (1) the quality of the precedent's reasoning; (2) the workability of the rule it established; (3) its consistency with other related decisions; (4) developments since the decision was handed down; and (5) reliance on the decision.[2] In a 2020 concurrence, Justice Kavanaugh offered a somewhat more stringent standard, opining that a proper *stare decisis* inquiry asks: "*First*, is the prior decision not just wrong, but grievously or egregiously wrong? … *Second*, has the prior decision caused significant negative jurisprudential or real-world consequences? … *Third*, would overruling the prior decision unduly upset reliance interests?"[3]

Dobbs v. Jackson Women's Health Organization

In December 2021, the U.S. Supreme Court heard oral argument in *Dobbs v. Jackson Women's Health Organization*, a challenge to a Mississippi law that generally prohibits abortions after 15 weeks gestation. Plaintiffs in the case argued that Mississippi's law violates the Court's abortion law precedents, which they asked the Court to reaffirm based on the *stare decisis* analysis in *Casey*. During the oral argument, plaintiffs noted the confusion that has emerged in applying the "undue burden" test but argued that viability is a workable and justifiable line to draw. They emphasized that a constitutional right to pre-viability abortions grounded in the Fourteenth Amendment – the central holding in *Roe* and *Casey* – has been widely relied upon and is unaffected by any major scientific or medical developments. In contrast, the State of Mississippi argued that *Roe* and *Casey* are "egregiously wrong" and should be overruled, or, at a minimum, that viability should no longer be the applicable standard.

Effect on Wisconsin Law if *Roe* and *Casey* Are Overruled

If the U.S. Supreme Court overrules *Roe* and its progeny in *Dobbs*, the question of how to regulate abortion would be decided by Congress and each individual state. Wisconsin law includes various criminal prohibitions against the performance of abortions. Of particular relevance, s. 940.04, Stats., prohibits any person, other than the mother, from intentionally destroying the life of any unborn child or unborn "quick child," but this statute is currently unenforceable under *Roe* and *Casey*.[4] If *Roe* and *Casey* were overruled, depending on the precise nature of the holding, s. 940.04, Stats., which provides criminal penalties up to a Class E felony, may be enforced again, with two caveats. First, district attorneys are generally provided wide discretion in determining whether to prosecute violations of the law. Thus, the degree of enforcement may vary throughout the state.

Second, the enforceability of the statute could be subject to challenge on one or more grounds. For example, a litigant could argue that s. 940.04, Stats., may not be enforced because it has not been applied against an abortion provider for a long period of time, or that it was impliedly repealed by legislation enacted after *Roe*. However, in at least one case, the Wisconsin Supreme Court determined that the enactment of s. 940.15, Stats., a separate criminal statute that prohibits post-viability abortions, did not impliedly repeal s. 940.04 (2) (a), Stats.[5] In addition, a legal challenge could argue that s. 940.04, Stats., is unenforceable based on protections afforded under the Wisconsin Constitution. In other contexts, the Wisconsin Supreme Court has held that its interpretation of the Wisconsin Constitution is "not constrained" by the interpretation of similar provisions of the U.S. Constitution.[6] However, in past cases, the Wisconsin Supreme Court has interpreted Article I, Section I of the Wisconsin Constitution in tandem with Fourteenth Amendment's due process clause.[7]

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[1] *Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740 (7th Cir. 2021); *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020).
[2] *Janus v. American Fed'n of State, County, and Mun. Employees*, 585 U.S. ___ (2018).
[3] *Ramos v. Louisiana*, 590 U.S. ___ (2020) (Kavanaugh, J., concurring) (emphasis in original).
[4] *Roe* specifically identifies s. 940.04, Stats., as a statute similar to the one at issue in that case. [See *Roe*, 410 U.S. at 118 n.2.] Examples of other abortion statutes include ss. 940.15 and 253.107, Stats., both enacted after *Roe* and currently enforceable.
[5] *State v. Black*, 188 Wis. 2d. 639 (1994). Note, however, that *Black* also held that s. 940.04 (2) (a), Stats., is "a feticide statute only," though this holding may be rooted in *Roe*'s limitations on pre-viability abortion regulations, thereby raising uncertainty as to this holding's applicability should *Roe* be overturned.
[6] *State v. Miller*, 202 Wis. 2d 56, 66 (1996).
[7] See, e.g., *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 35.